Supreme Court, U.S.
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No. 03-475

In the Supreme Court of the United States

IN RE RICHARD B. CHENEY,
VICE PRESIDENT OF THE UNITED STATES, ET AL.,
Petitioners

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENT JUDICIAL WATCH, INC.

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QUESTION PRESENTED

Whether the Court of Appeals' denial of Petitioners' request for mandamus relief and attempted interlocutory appeal of the district court's order that they are subject to discovery creates a conflict with any decision of this Court or any circuit court or raises an important question of federal law that has not been decided by this Court.

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STATEMENT OF THE CASE

The critical facts for the purpose of review of the Petition For a Writ of Certiorari ("Petition" or "Pet.") are relatively few. This case involves the continuing effort of the Bush Administration to keep secret records relating to its energy policy task force, known as the National Energy Policy Development Group ("NEPDG"). In July 2001, Respondent Judicial Watch, Inc. ("Judicial Watch") filed suit alleging that, along with certain high-level government officials, private executives and lobbyists representing the energy industry were invited to participate in the NEPDG as it carried out its mission of developing a "national energy policy designed to help . . . promote dependable, affordable, and environmentally sound production and distribution of energy for the future." *In Re: Richard B. Cheney*, 334 F.3d 1096 (D.C. Cir. 2003) (set forth in Appendix to Petition ("Pet. App") at page 2a (citing Mem. Establishing NEPDG, Jan. 29, 2001)).

Judicial Watch alleged that the NEPDG failed to comply with the procedural requirements of the Federal Advisory Committee Act ("FACA"), 5 U.S.C. App. 1, and sought, among other things, a judgment declaring Defendants to be in violation of FACA and an order requiring release of a "full and complete copy of all records . . . made available to or prepared for Defendant NEPDG," as well as "detailed minutes of each meeting of Defendant NEPDG . . . that contain a record of persons present, a complete and accurate description of matters discussed and conclusions reached, and copies of all reports received, issued, or approved by Defendant NEPDG." Judicial Watch Compl. ¶ 22. Shortly thereafter, Respondent Sierra

Club filed a similar lawsuit in the U.S. District Court for the Northern District of California, which was subsequently consolidated with Judicial Watch's.

Petitioners moved to dismiss, arguing, as they do now, that "application of FACA to the NEPDG's operations would directly interfere with the President's express constitutional authority" and that "such an expansive reading of FACA would encroach upon the President's constitutionally protected interest in receiving confidential advice from his chosen advisers, an interest that is also rooted in the principle of separation of powers." Pet. 4a-5a (citing Mem. in Support of Mot. to Dismiss at 3 (D.D.C. Mar. 8, 2002)). The district court appropriately deferred ruling on the Petitioners' separation of powers claim, explaining that, "after discovery, the government may prevail on summary judgment on statutory grounds without the need for this Court to address the constitutionality of applying FACA [to the Vice President]." *Judicial Watch, Inc. v. Nat'l Energy Policy Dev. Group*, 219 F. Supp. 2d 20, 54-55 (D.D.C. 2002). The district court was fully cognizant that, "while discovery in this case may raise some constitutional issues, those issues of executive privilege will be much more limited in scope than the broad constitutional challenge raised by the government here." *Id.* at 55. The court then denied Petitioners' motion to dismiss, approved Respondents' discovery plan, and unambiguously ordered Petitioners to "fully comply with the [discovery] requests," "file detailed and precise objections to particular requests," or "identify and explain their invocations of privilege with particularity." Pet. 5a (citing Order Approving Disc. Plan at 2 (D.D.C. Aug. 2, 2002)).

Petitioners did not comply with the court's order. On behalf of the Vice President, Petitioners filed a motion for a protective order, arguing essentially that the Vice President was immune to discovery, as it allegedly would violate the constitutional separation of powers. Petitioners then sought permission to file a motion for summary judgment on the scanty administrative record developed thus far.

The court denied Petitioner's motion for a protective order and request to file for summary judgment, and directed defendants to "produce non-privileged documents and a privilege log." Pet. 6a (citing Order Den. Mots. for Recons. and Protective Order at 1 (D.D.C. Oct. 17, 2002)). The court indicated its willingness to address Petitioners' concerns by offering to either review allegedly privileged information *in camera* or appoint a special master to review privilege claims. *Id.* (citing Tr. of Omnibus Mots. Hr'g at 4:15-5:12 (D.D.C. Oct. 17, 2002)).

Again, Petitioners did not comply with the court's order. Instead of responding to the discovery requests and filing a privilege log (or even completing an internal review of the documents at issue), Petitioners asked for certification under 28 U.S.C. § 1292(b) for an interlocutory appeal. After the district court declined, Mem. Op. and Order (D.D.C. Nov. 27, 2002), Petitioners filed an emergency motion for writ of mandamus in the U.S. Court of Appeals for the D.C. Circuit ("Court of Appeals"), seeking an order "vacating the discovery orders issued by the district court, directing the court to decide the case on the basis of the administrative record and such supplemental affidavits as it may require, and directing that the Vice President be dismissed as a defendant." Pet. 7a

(citing Emergency Pet. for Writ of Mandamus at 20). The Vice President also filed a notice of appeal from the district court's order denying the motion to dismiss and from the various discovery orders.

The Court of Appeals firmly rejected the petition for a writ of mandamus and granted Respondents' motion to dismiss the appeal. The Court of Appeals held that Petitioners failed to satisfy the heavy burden required to justify the extraordinary remedy of mandamus. Pet. 19a. The panel majority unsurprisingly concluded that the district court's legal rulings could be fully considered on appeal following final judgment, and Petitioners' claims of harm could be fully cured in the district court through, as promised by the court, narrow, carefully focused discovery. As anticipated by the Court of Appeals, either the Vice President then would have no need to claim privilege, or if he did, then the "district court's express willingness to entertain privilege claims and to review allegedly privileged documents in camera would prevent any harm." The Court of Appeals also dismissed the Vice President's appeal, concluding that the collateral order doctrine did not apply, nor did *United States v. Nixon*, the only authority relied on by Petitioners. These two narrow issues ruled upon by the Court of Appeals – the petition for mandamus and the dismissal of the interlocutory appeal – are the only ones properly before this Court.

Petitioners now seek relief from this Court, having defied repeatedly the discovery orders of the district court, and asserting a wholly unprecedented theory of immunity from discovery. While this "unique" theory has failed at every stage below, Petitioners have succeeded splendidly in

delaying the advancement of this case. The proposals developed by the NEPDG currently are moving through Congress, while critical information regarding how these proposals were developed remains secret from the public. This transparent strategy of "running out the clock" should not be tolerated.

REASONS FOR DENYING THE WRIT

In this Court and below, Petitioners have made repeated attempts to transform the actual issues before the Court of Appeals into ones of urgent constitutional concern. As the Court of Appeals correctly held, however, no such issues exist. The two familiar and straightforward issues of mandamus and collateral review ruled on by the Court of Appeals raise no concerns justifying review by this Court.

Petitioners wholly fail to establish that the Court of Appeals misapplied the doctrines of mandamus or collateral review – the only issues that were before the Court of Appeals. The Court of Appeals rejected Petitioners' brazen and unprecedented argument that the Vice President is immune from discovery and should be relieved from the district court's discovery orders. The Court of Appeals' decision not to grant interlocutory relief on this novel theory raises no "compelling" reason warranting review. Sup. Ct. Rule 10. Petitioners have cited no conflict with a decision of this Court or any other circuit court that the Court of Appeals failed to follow.[1] Any constitutional issues that are of concern to Petitioners are entirely

[1] Petitioners concede that no circuit conflict exists. Pet. 12 n.2.

speculative and were not at issue before the Court of Appeals.

I. The Court of Appeals' Denial of Mandamus Relief Was Appropriate and Does Not Warrant Review by This Court.

The Court of Appeals' ruling was straightforward and unsurprising. The court plainly stated that it was "bound by well-established rules of both the Supreme Court and this court" in regard to the "drastic" remedy of mandamus, which is to be "invoked only in extraordinary situations." Pet. App. 7a-8a (quoting directly from *Kerr v. United States Dist. Court*, 426 U.S. 394, 401 (1976); *Will v. United States*, 389 U.S. 90, 95 (1967)). The Court of Appeals' denial of mandamus relief was entirely appropriate, as Petitioners have never been able to establish a harm they will suffer that is not entirely speculative. As Chief Judge Edwards succinctly stated, Petitioners "can point to no harm because [they have] yet to specify any privileged materials or otherwise cite objections for consideration by the District Court." Pet. 27a (concurring). Petitioners do not cite, much less attempt to explain, how the Court of Appeals "seriously misread" the holding in *Kerr* or otherwise misapplied the hoary doctrine of mandamus. *Vermont Yankee Nuclear Corp. v. NRDC*, 436 U.S. 519 (1978).

Instead, Petitioners consistently confuse the issues before this Court, alleging that "fundamental separation-of-powers questions arise from the district court's orders compelling the Vice President" and other advisors to "comply with broad discovery requests." Pet. 6.

Petitioners' fundamental objection is that the FACA, as allegedly interpreted in this and prior cases, is unconstitutional. Pet. 8-16. As the Court of Appeals noted, constitutional issues involving the separation of powers may – at some point – arise in this case. Pet. 19a. That point, however, has not arrived. This Court, of course, refrains from granting review of cases involving prematurely-raised constitutional issues. *Communist Party v. Subversive Activities Control Bd.*, 367 U.S. 1, 70-81 (1961).

Petitioners have not been ordered to disclose any privileged or other information. Furthermore, they have not offered any evidence of how the President or Vice President would be so "distracted" by his counsels' mere review of documents and assertions of privilege. Pet. 21. The "parade of horribles" on which Petitioners dwell is entirely speculative. Petitioners argue only that the lower courts' decisions "*threaten*" substantial interference with the Executive Branch. Pet. 9 (emphasis added). No court has issued any order that requires compliance with any overly broad or intrusive discovery or inappropriate disclosure of documents. Instead, the district court promised "tightly reined" discovery to allay any such concerns by Petitioners. *See* Pet. App. 19a. Hence, Petitioners' complaints are entirely premature. The Court of Appeals correctly and predictably held, closely following *Kerr*, that the "drastic" remedy of mandamus relief was not necessary to address an entirely hypothetical concern. *Id.* at 18a. Petitioners have failed to establish how this holding is in conflict with other decisions or involves questions of federal law not previously considered by the Court.

II. The Court of Appeals Correctly Applied the Law Concerning Collateral Review.

Petitioners provide no basis for their contention that the Court of Appeals' decision justifies review of the district's discovery orders under 28 U.S.C. section 1291. As Chief Judge Edwards plainly stated, discovery orders are appealable only after "entry of final judgment in the underlying case, or under the "collateral order" doctrine upon entry of an order holding the litigant in criminal contempt." Pet. App. 26a (citing *Byrd v. Reno*, 180 F.3d 298, 302 (D.C. Cir. 1999); *In re Kessler*, 100 F.3d 1015, 1016 (D.C. Cir. 1997)). Accordingly, in the absence of a final judgment in the underlying case (or an order of criminal contempt), the Court of Appeals denied review under section 1291.

The Court of Appeals correctly noted that the only authority cited by Petitioners in support of collateral review, in the absence of a final order, was *United States v. Nixon*, 418 U.S. 683 (1974). Remarkably, Petitioners still rely on *Nixon* (Pet. at 23) even though *Nixon* involved an order *after* the President's assertion of executive privilege. In striking contrast, Petitioners make the wholly unsupported argument that the Vice President is immune from discovery (Pet. 22-23) and not required to assert executive privilege, any other privilege, or otherwise comply with discovery. Such a claim is risible after *Clinton v. Jones*, 520 U.S. 681 (1997), established that even the President is not immune from civil discovery, even when the case relates to matters outside his official duties. The Court of Appeals correctly followed this clear precedent, and declined to consider premature and

unprecedented theories on an attempted interlocutory appeal. Thus, Petitioners again have failed to identify any conflicting opinions or important questions of federal law not previously ruled upon by this Court that justify granting the Petition.

CONCLUSION

For the foregoing reasons, Respondent Judicial Watch, Inc., respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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